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No. 153

Supreme Court of the United States.

OCTOBER TERM, 1940.

JOHN J. CHICKERING, ADMINISTRATOR,
Petitioner for Certiorari,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

FREDERICK H. NASH,
Attorney for Petitioner.

CHOATE, HALL & STEWART,
Of Counsel.

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To the Honorable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioner, prays that a writ of certiorari may issue to review the decree of the Circuit Court of Appeals for the First Circuit entered March 13, 1941, in the case between the above-named parties docketed therein as No. 3618.

Opinions Below.

The opinion of the Circuit Court of Appeals appears at pages 97 to 107 of the Record and has been printed in 118 F. (2d) 254. There is no official report of the

opinion of the Board of Tax Appeals. It appears in the Record, pages 82 to 87.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on March 13, 1941 (R. p. 107). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

The action to which this petition relates is a petition for review of a decision of the United States Board of Tax Appeals.

Questions Presented.

(1) Does Section 302 (d) of the Revenue Act of 1926 purport to lay an excise on anything other than a transfer by the decedent made before death?

(2) If not, does the fact that the decedent at death held a special power, narrowly circumscribed, by which she could merely deprive her issue of rights under a trust justify a tax under said Section 302 (d) upon property settled in trust in 1901?

(3) Where a decedent dying in 1935 had in 1901 accepted, in lieu of an inheritance not reduced to possession, a beneficial interest in a trust of her ancestor's property, which trust gave to her a special power to cut off a remainder interest therein in her issue, is the value of the expectancy to be included in the gross estate under said Section 302 (d) upon the footing that the 1901 transaction constituted a transfer by the decedent of property the enjoyment of which was at her death subject to change through her exercise of a power to alter, amend, or revoke?

(4) If the Act purports to impose an excise on this transfer, is its application under the facts herein forbidden by the Fifth Amendment?

The Statute Involved.

The pertinent provision of the Revenue Act of 1926, under which the case arises, was as follows:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> . . . . . .
>
> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth;
>
> . . . . . .
>
> "(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

Statement.

The facts are all stipulated. From them the following appears:

The petitioner's intestate (hereinafter called the decedent) died in 1935 leaving one son surviving her. Her father had died intestate in 1899 leaving his widow and five children as his heirs. In 1901, with the consent of the heirs, his personal estate which was then distributable to the heirs (but not distributed) was conveyed to trustees and the heirs conveyed to the trustees his real estate. Prior to these conveyances the decedent had an expectancy of 13 1/3 per cent of the estate. Under the trust to which the property was conveyed the decedent received and enjoyed a life estate in possession which at her death was in 21 per cent of the trust property. Upon her death this interest would pass to her son, subject, however, to a power in the decedent to cut him off. In the event of exercise of the power the estate thus "disappointed" would pass to the other beneficiaries pursuant to the provisions of the trust and not pursuant to any appointment. Each of the other four brothers and sisters took similar interests in the trust and had identical special powers over their interests. The powers consequently were strictly reciprocal and the exercise of any would redound to the benefit of each other donee-grantor or his heirs.

Upon the decedent's death the petitioner did not include any interest in the trust in the gross estate for purposes of the estate tax under the Revenue Act of 1926. The Commissioner assessed a deficiency on account of this property. This was reduced in part upon petition to the Board of Tax Appeals, but it was there determined that the petitioner should have included in the gross estate 13 1/3 per cent of the total 1935 value of

the trust property. This was upon the theory that the trust settlement of 1901 constituted, within the language of the Act, a transfer by the decedent of property, the enjoyment whereof was at her death in 1935 subject to change through the exercise of the power just mentioned as a power to alter, amend, or revoke. The deficiency amounted to $125,856.69. This decision was affirmed by the Circuit Court of Appeals for the First Circuit upon petition for review.

Specification of Errors.

1. The Court erred in deciding that 13 1/3 per cent of the corpus of the William A. Russell Trust was includable in the decedent's gross estate.

2. The Court erred in deciding that Mrs. Chickering's power to cut off her son, irrevocably established as one of the reciprocal conditions created by the mutual covenants in 1901, subjected the corpus to a retroactive tax under the Act of 1926 at its full value at her death in 1935.

3. The Court erred in deciding that an excise tax may be imposed upon property irrevocably transferred prior to the enactment of the taxing statute because subject to a special power in the transferor, although the power retained could not have been relinquished after the Revenue Act.

4. The Court erred in deciding that the decedent had a right without concurrence of substantially adverse interests to release her power.

5. The Court erred in deciding that the reciprocal powers were personal to the grantors as grantors and retained for their own benefit, while failing to decide

that those powers existed equally for the benefit of all of the other grantors as beneficiaries, and hence that the powers could not be changed or released without the consent of substantially adverse interests.

6. The Court erred in failing to observe that, although Mrs. Chickering should release her power to benefit the other grantors, nevertheless she must receive under the trust her share of whatever property the other grantors might cut away from their issue, thus modifying the trust and accomplishing a complete disruption of its purposes.

Reasons for Granting the Writ.

(1) The Circuit Court of Appeals in its decision refused to follow decisions of this Court, notably that in *Helvering* v. *Helmholz,* 296 U.S. 93. In its opinion the Circuit Court of Appeals referred to that case and likewise to *White* v. *Poor,* 296 U.S. 98, and sought to distinguish them by stating that in those cases

> "the taxpayers had retained powers, in trusts created prior to the enactment of the applicable section of the estate tax, which were exercisable only with the consent of persons adversely interested in such exercise. To tax on the basis of such a power would, the court held, be in effect retroactive, since the decedents had parted with all real control,"

whereas in the case at bar

> "Mrs. Chickering's power was not circumscribed by any requirement of concurrence in its exercise" (R. pp. 104, 105).

In the *Helmholz* case the decedent had a special power of appointment exercisable without the concurrence of any other person and consequently not to be distinguished from the power in the decedent in the case at bar.

(2) The Circuit Court of Appeals demonstrates in its opinion a confusion in the cases between the different bases for tax under the several clauses of Section 302 of the Revenue Act. By reason of this confusion there is danger of widespread misapplication of the criteria of decision, of which danger this case is an example, which merits authoritative determination by this Court.

The Circuit Court of Appeals considered the tax as an excise laid upon the retention at the date of death of a power of appointment measured by the value of the corpus subject to the power. This is apparent from the discussion of the opinion in *United States* v. *Jacobs*, 306 U.S. 363. (See R. p. 102.) From the language of the Act it is apparent that the excise is laid, not simply upon the existence of the power, but upon the transfer prior to death out of which the power had its rise. The evident theory of the statute is that it imposes a tax upon a transfer which is incomplete by reason of the retention of a power.

Due to this failure to apprehend the basis of taxation the Circuit Court of Appeals failed to apply the appropriate criterion to determine whether the tax was or was not retroactive and consequently within the denunciation of the Fifth Amendment.

(3) The opinion of the Circuit Court of Appeals directly conflicts with decisions of the Circuit Court of Appeals for the Second Circuit holding that a tax such as that here imposed avoids the objection of retro-

activity only where the power in question could have been freely relinquished between the enactment of the statute and the death. Those decisions are

Porter v. *Commissioner*, 60 F. (2d) 673.
Witherbee v. *Commissioner*, 70 F. (2d) 696.
Commissioner v. *Chase National Bank*, 82 F. (2d) 157.

The Circuit Court of Appeals likewise misconstrued the trust settlement in question in concluding that the decedent's power of appointment could have been relinquished and in failing to observe that the power was created for the benefit of the co-grantor beneficiaries of the trust and so required their consent to any relinquishment. The decision is consequently contrary to *Reinecke* v. *Northern Trust Company*, 278 U.S. 339.

Wherefore it is respectfully submitted that the petition should be granted.

FREDERICK H. NASH,
Attorney for Petitioner.

CHOATE, HALL & STEWART,
Of Counsel.

Dated at Boston, Massachusetts,
June 6, 1941.